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In the
Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
12/10/2020
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ZENA COLLINS STEPHENS,

*Appellant,*

v.

THE STATE OF TEXAS,

*Appellee.*

In the Court of Appeals for the First District of Texas in Houston
No. 01-19-00209-CR and No. 01-19-00243-CR

# PETITION FOR DISCRETIONARY REVIEW OF APPELLANT ZENA COLLINS STEPHENS

Russell Wilson II
Law Office of Russell Wilson II
1910 Pacific Ave. #15100
Dallas, Texas 75201
(469) 573-0211
russell@russellwilsonlaw.com

Chad W. Dunn
Brazil & Dunn LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
(512) 717-9822
(512) 515-9355 Facsimile
chad@brazilanddunn.com

*Counsel for Appellant*

## IDENTITY OF JUDGES, PARTIES AND COUNSEL

**Appellate Court Judges:**
Chief Justice Sherry Radack and Justices Peter Kelly and Gordon Goodman
Court of Appeals, First District of Texas

**Trial Court Judge:**
Hon. Randy McDonald, 344th Judicial District Court of Chambers County, Texas

**Appellant:**
Zena Collins Stephens

**Appellate and Trial Counsel for Appellant:**
Russell Wilson II
Law Office of Russell Wilson II
1910 Pacific Ave. #15100
Dallas, Texas 75201
russel@russellwilsonlaw.com

Chad Dunn
Brazil & Dunn LLP
4407 Bee Caves Road #111
Austin, Texas 78746
chad@brazilanddunn.com

Sean C. Villery-Samuel
Samuel & Son Law Firm, PLLC
2636 McFaddin
Beaumont, Texas 77701
attysamuel@live.com

**Appellee:**
The State of Texas

**Appellate and Trial Counsel for Appellee:**
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins
Adrienne McFarland
Lisa Tanner
Beth Klusmann (lead appellate counsel)
Nick A. Moutos

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
beth.klusmann@oag.texas.gov

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## STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be permitted in this case because this case involves significant statutory and constitutional questions which go to the heart of the administration of elections and separation of powers. Full development of the legal issues presented by this appeal would aid the court in resolving this appeal.

## STATEMENT OF THE CASE

This case involves the prosecution of Zena Collins Stephens, the elected Sheriff of Jefferson County. In violation of the Texas Constitution, and after the Jefferson County District Attorney refused the case, the Attorney General changed the venue to Chambers County and indicted Stephens for an alleged violation of Penal Code § 37.10 (count I of the indictment) without the consent of the local district attorney in Chambers or Jefferson County. A Chambers County grand jury returned a three-count indictment against Stephens. Count one alleged a violation of Texas Penal 37.10 (Tampering with Government Record) and counts two and three alleged violations of Texas Election Code provisions (misdemeanor charges of accepting a cash donation exceeding $100). The indictment alleged that all of the conduct took place in Jefferson County.

## STATEMENT OF PROCEDURAL HISTORY

At the trial court, Stephens moved to quash the indictment and applied for a

writ of habeas corpus. The trial court granted Stephens' motion to quash as to Count I and denied her application for a writ of habeas corpus. The State appealed the trial court's order to quash, and Stephens appealed the denial of her application for a writ of habeas corpus. On July 9, 2020, over a written dissent, a panel of the First District Court of Appeals reversed the trial court's quashing of count I of the indictment and affirmed the denial of the writ of habeas corpus as to prosecutorial authority and venue. Stephens filed a Motion for Rehearing En Banc which was denied. Stephens sought an extension from this Court to prepare this Petition, which is now timely filed.

## QUESTIONS PRESENTED FOR REVIEW

1.

Whether, if the Attorney General has the authority to prosecute this case under § 273.021, the statute's grant of prosecutorial authority violates the separation of powers requirement in the Texas Constitution.

2.

Whether the Attorney General has the authority to prosecute "election law" cases outside of the Election Code, and if so, whether Penal Code § 37.10 is an "election law" within the meaning of Election Code § 273.021.

3.

Whether campaign finance reports are "election records" within the meaning of Penal Code § 37.10.

## ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW

The court below misinterpreted statutory language to find that the Attorney General (the "AG") has statutory authority to prosecute alleged election law violations outside of the Election Code; misapplied precedent to find that Penal Code § 37.10 is an election law; improperly extended the definition of "election records" in the Penal Code contrary to principles of statutory interpretation; and, most significantly, broadened the AG's power in a manner violative of the separation of powers requirement in the Texas Constitution.

The absence of criminal prosecutorial authority from the AG's constitutional portfolio was a deliberate response to the "despotic control of the reconstruction governor." *Saldano v. State*, 70 S.W.3d 873, 877 (Tex. Crim. App. 2002). The Constitution of 1876 stripped the Supreme Court of Texas of its criminal jurisdiction and thereby eliminated the sole specific constitutional authority the AG had once possessed to represent the state in criminal cases. *See id.* 879-81 (Tex. Crim. App. 2002). This authority was instead spread among a multitude of independently elected district attorneys and county attorneys outside of the executive department. Prosecutorial authority was deliberately fractured, as it remains to this day. *See id.* at

877–78.

Prosecution of §37.10 is exclusively in the province of local district attorneys. The legislature carved a narrow exception to this rule that permits the AG to prosecute Medicaid cases if the AG, obtains the consent of the district attorney, but nothing more. By requiring consent of the local district attorney and limiting the ability to consent to Medicaid cases, the legislature maintained the original constitutional separation of powers. Nevertheless, the court below found that the AG enjoys jurisdiction over this prosecution on account of Election Code § 273.021(a), which provides that the AG may "prosecute a criminal offense prescribed by the election laws of this state." In undertaking the analysis to make this finding, the court of appeals made numerous critical errors in reversing the district court's quashing of Count I and denying Stephens' writ of habeas corpus.

*First*, if § 273.021(a) authorizes the AG to prosecute Stephens, it is facially unconstitutional because it violates the Constitution's separation-of-powers mandate. The Texas Constitution creates three distinct departments of government and mandates that members of one shall not exercise any power properly attached to the others, unless the Constitution *expressly* provides for its exercise. The Constitution grants the authority to represent the State in district and inferior courts to district attorneys and county attorneys, who are members of the judicial

department. The Constitution contains no express permission for the legislature to assign this prosecutorial function to the AG.

*Second,* the AG's prosecutorial power under the Election Code even were it constitutional, is limited to "election laws" in that Code, meaning the AG has no authority to prosecute a Penal Code violation based on § 273.021(a). The legislature knew how to grant power outside the Election Code—it provided the Secretary of State administrative power over "election laws outside this code," but chose not to extend that power to the AG, if it could. And even assuming that the AG has authority to prosecute election laws outside of the Election Code, a statute proscribing "Tampering with Governmental Record" is not an election law. As the Fifth Circuit has held, the legislature did not intend for such generally applicable laws as Penal Code § 37.10 to fall under the purview of "election laws." Even if the Election Code did provide the AG such authority, it would conflict directly with the more specific and later-enacted provision limiting the AG's power to Medicaid cases.

*Third*, the AG lacks power to prosecute Count I because campaign finance reports are not "election records" as that phrase is used in the Penal Code. Under the Penal Code, "election record" is limited in character to the specific, preceding example in the statute: "official ballot[s]" or other materials related to voting.

## I. If the Attorney General has the authority to prosecute this case under § 273.021, the statute's grant of prosecutorial authority violates the separation of powers requirement in the Texas Constitution.

The Texas Constitution creates three distinct departments and mandates that members of one shall not exercise any power properly attached to the others, unless the Constitution expressly provides. TEX. CONST. art. II, § 1. The Constitution grants the authority to represent the State in district and inferior courts to district and county attorneys, who are members of the judicial department. *Id.* art. V, § 21. This grant of authority includes the exclusive responsibility and control of criminal prosecutions. *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987). The court below concluded that the legislature has nevertheless authorized the AG, a member of the executive department, to represent the State in district and inferior courts to prosecute election-law violations. As the dissent found, such authorization dangerously violates the separation of powers requirement. Dissenting Opinion, *Texas v. Stephens*, No. 01-19-00209-CR, at 8 (July 9, 2020) (hereinafter "Dissent").

Article II, § 1 of the Texas Constitution provides that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." TEX. CONST. art. II, § 1. This ensures "that a power which has been granted to one department of government may be exercised only by that branch to the exclusion of

others," *Ex parte Giles*, 502 S.W.2d 774, 780 (Tex. Crim. App. 1974), and thus "any attempt by one department of government to interfere with the powers of another is null and void." "Exceptions to the constitutionally mandated separation of powers are never to be implied in the least; they must be 'expressly permitted' by the Constitution itself." *Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2014) (quoting TEX. CONST. art. II, § 1).

The AG is an officer of the executive department, *id.* art. IV, § 1, and provides that the AG "shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party," file suits against private corporations acting unlawfully, "give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law." *Id.* art. IV, § 22. By contrast, the Constitution provides that county attorneys and district attorneys are officers of the judicial department, *id.* art. V, § 21, and provides that "the County Attorney *shall* represent the State in *all cases* in the District and inferior courts in their respective counties" *id.* (emphasis added). "The laws of Texas vest in district and county attorneys the exclusive responsibility and control of criminal prosecutions and certain other proceedings." *Baker v. Wade*, 743 F.2d 236, 242 n.28 (5th Cir. 1984).

The Texas courts have "consistently prevented the Legislature from removing

or abridging the constitutional duties of county attorneys." *Meshell*, 739 S.W.2d at 254. This is so because "under the separation of powers doctrine, the Legislature may not remove or abridge a district or county attorney's exclusive prosecutorial function, unless authorized by an express constitutional provision." *Id.* at 254-55; *see also Hill County v. Sheppard*, 142 Tex. 358, 364 (Tex. 1944) ("'Where certain duties are imposed or specific powers are conferred upon a designated officer, the Legislature cannot withdraw them *nor confer them upon others* nor abridge them or interfere with the officer's right to exercise them unless the Constitution expressly so provides.'" (quoting 30 Tex. Jur. 445) (emphasis added)). The Texas Constitution contains no provision that "expressly permit[s]," TEX. CONST. art. II, § 1, the AG to prosecute election law violations in district courts. Neither the Supreme Court nor the Court of Criminal Appeals has held that the AG may prosecute election law violations.

According to the court below, this constitutional clause: "perform such other duties as may be required by law," TEX. CONST. art. IV, § 22, provides the requisite express permission for statewide prosecutorial power. The court below purports to rely upon the doctrine of *ejusdem generis* in making this finding but proceeds to disregard the doctrine's fundamental point: that "the principle of ejusdem generis warns against the *expansive interpretation* of broad language that immediately follows narrow and specific terms, and counsels us to construe the broad in light of the

*narrow*." *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010) (emphasis added). In reference to the duties assigned to the AG in the Constitution, the court below opinion finds that "[i]n general, these duties relate to State created entities," *Stephens*, No. 01-19-00209-CR at 17, and uses this characterization to expand the AG's prosecutorial authority to cover the criminal prosecution of *anything* that is a "creature of state action," *Id.* at 18, including all election laws. As demonstrated by the dissent's analysis, this is not how the principle of *ejusdem generis* operates. *See* Dissent at 6.

The doctrine of *ejusdem generis* requires that the "other duties" the legislature may assign must be of the same character as those specifically enumerated: representing the state in civil cases before the Texas Supreme Court, inquiring into charter rights of private corporations, suing in state court to prevent private corporations from exercising powers not authorized by law, seeking judicial forfeiture of charters, and providing legal advice to the Governor and other executive officers. TEX. CONST. art. IV, § 22. "None of these specific constitutional grants of authority to the Attorney General concern criminal proceedings or elections," precluding the court below's expansive interpretation. Dissent at 6. Furthermore, the "other duties" clause says *nothing* about the governmental branch from which those duties may derive. The clause's silence means that those "other duties" must be executive branch

duties.

The court below makes other notable errors identified in the dissent. First, the opinion references dictum from *Saldano* that remarks in passing that the legislature's ability to assign other duties to the AG, "presumably, could include criminal prosecution." 70 S.W.3d at 880; *see Stephens*, No. 01-19-00209-CR at 18. But this nonbinding remark is instructive "solely to the extent that its analysis is persuasive," and "[d]ictum bereft of analysis is not persuasive." Dissent at 9 (citing *Garrett v. State*, 377 S.W.3d 697, 704 n.27 (Tex. Crim. App. 2012)). Moreover, the *Saldano* court's hesitant dicta did not suggest that *any* criminal prosecutions could be assigned to the AG. The Constitution specifies a particular type of suit within the authority of the AG—suits to prevent corporations from exercising authority not authorized by law. The AG could be assigned power to prosecute criminal violations of a similar character. But no fair reading of *Saldano* suggests that the court thought that the legislature could completely upend the constitutionally established roles of the AG and the county and district attorneys.

The opinion also relies on the idea that "some duties imposed upon the Attorney General are both executive and judicial" in nature. *Stephens*, No. 01-19-00209-CR at 18. The point is a "non-sequitur"—simply because "the Constitution expressly gives the Attorney General duties that are both executive and judicial in

function despite his status as an officer of the executive department, it does not follow that the Legislature may give him any additional judicial duty it desires." Dissent at 9. Notably, if § 273.021(a) grants the AG the court below holds, it is the only statute that permits the AG to unilaterally initiate a prosecution for a violation of Texas election law. TEX. ELEC. CODE § 273.021(a); *see also* Dissent at 11.

Critically, "other duties" clause stands in stark contrast to other provisions of the Constitution that actually "expressly permit" an official from one branch of government to exercise the powers of another branch of government. For example, the president pro tempore of the senate "shall perform the duties of the Lieutenant Governor in any case of absence or temporary disability" and those duties shall be "in addition to the member's duties as Senator until the next general election," TEX. CONST. art. III § 9; or "[t]he Lieutenant Governor shall by virtue of his office be President of the Senate, and shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote," *id.* art. IV § 15. The examples are numerous. The "other duties" clause is nothing like these express provisions.

If the court below were correct, then the legislature could entirely *exempt* the AG from the Constitution's separation of powers limitation by virtue of the "other duties" provision. And that exemption from the separation of powers limitation—a

bedrock constitutional principle—would not stop at the AG. The Constitution also permits the legislature to assign the secretary of state and the Texas Water Development Board "other duties," TEX. CONST. art. III § 49-c; art. IV § 21, to assign Notaries Public "such duties as . . . may be prescribed by law," *id.* art. IV § 26, and to assign duties to County Clerks and Sheriffs, *id.* art. V, §§ 20 & 23. If the court below were correct, then the legislature could task the *Water Development Board* with deciding which cases this Court must review. This reasoning renders meaningless separation of powers.

Section 273.021's purported grant of authority to the AG to prosecute election law violations is an unconstitutional violation of the separation of powers. The Constitution contains no express permission for the legislature to assign this prosecutorial function to the AG, and thus election law prosecutions must be brought by the county or district attorney, who "shall" have power over "*all cases* in the District and inferior courts," TEX. CONST. art. V, § 21 (emphasis added).[1]

## II. The Court could have avoided reaching the constitutional issues with respect to Count I by properly applying the canons of construction.

[1] The court below also erred in concluding that Stephens had waived her separation-of-powers argument with respect to Counts II and III of the indictment because of the stray reference to "Count I" in a header. *Stephens*, No. 01-19-00209-CR at 15. The body of the brief made clear this argument applied to all counts, and that is the only conclusion that makes sense. Section 273.021's constitutionality does not hinge on *which* election law is at issue. The court below violated the rule that courts should "not [be] hyper-technical in examination of whether error was preserved" *Bekendam v. State*, 441 S.W.3d 295, 301 (Tex. Crim. App. 2014).

"[T]he Attorney General is, with a few exceptions . . . not authorized to represent the State in criminal cases." *Ex parte Lo*, 424 S.W. 3d 10, 30 n.2 (Tex. Crim. App. 2014). Given that general rule, statutes authorizing the AG to act in a prosecutorial role, if they are constitutional, must be narrowly construed. Courts are to give effect to the plain meaning of statutes using the established canons of construction, *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991), in context, *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013), presuming that "every word of a statute…[has] been used for a purpose" or "*excluded* for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (emphasis added). "When two statutes conflict, the specific controls over the general. In addition, the more recent statutory enactment prevails over an earlier statute." *City of Dallas v. Mitchell*, 870 S.W.2d 21, 23 (Tex. 1994) (citations omitted).

**a. The Panel Opinion's Interpretation Creates a Direct Statutory Conflict that Must Be Resolved by Limiting the Attorney General's § 37.10 Prosecutorial Power.**

Section 37.10 provides: "With the consent of the appropriate local county or district attorney, the Attorney General has concurrent jurisdiction with the consenting local prosecutor to prosecute an offense under this section *that involves the state Medicaid program*." TEX. PENAL CODE § 37.10(i) (emphasis added). The legislature thus specifically contemplated whether the AG should have prosecutorial

authority under § 37.10, and granted that authority in only a narrow class of cases, and even then only with the consent of the local district or county attorney. The legislature must be presumed to have intended for Medicaid cases to be the *only* § 37.10 prosecutions within the jurisdiction of the AG. *See Dallas v. State*, 983 S.W.2d 276, 278 (Tex. Crim. App. 1998) (*en banc*) ("[I]f [a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." (quoting *Black's Law Dictionary* 692, 4th ed. (1951)).

The court below ignored this express limitation on the AG's prosecutorial authority under § 37.10, and instead concluded that Election Code § 273.021 authorized the AG to prosecute campaign finance violations under § 37.10. Section 273.021 provides that "the Attorney General may prosecute a criminal offense prescribed by the election laws of this state." TEX. ELEC. CODE § 273.021(a). But even if § 273.021's text permitted the conclusion that it authorized AG prosecutions under § 37.10, the court below's interpretation creates a direct conflict between the two statutes: it permits the AG to prosecute a category of § 37.10 violations that § 37.10 itself precludes the AG from prosecuting. The court below entirely ignored this conflict. But the rules of statutory construction compel the conclusion that the AG may not prosecute campaign finance record violations under § 37.10.

First, Section 37.10(i) applies specifically to "an offense under this section,"

including the offense alleged in Count I of the indictment in this case, whereas Election Code § 273.021 applies more generally to "election laws." The subject matter of § 273.021 is more general, and it is located in an entirely different *Code*. Because § 37.10(i) applies specifically to the offense alleged by Count I, it prevails over § 273.021(a). Second, § 37.10(i) is also the later-enacted statute. It was enacted by the legislature in 2003. *See* Act of June 18, 2003, 78th Leg. R.S., ch. 257, § 16. By contrast, Election Code § 273.021 was last amended in 1997. *See* Acts 1997, 75th Leg., ch. 864, § 255, eff. Sept. 1, 1997. "[W]hen statutes are in conflict, the more specific, and later, enactment controls," *In re Allcat Claims Serv. L.P.*, 356 S.W.3d 455, 473 (Tex. 2011); *Oakley*, 830 S.W.2d at 110, and thus the AG may only prosecute Medicaid related cases under Penal Code § 37.10.

**b. The court misconstrued Election Code § 273.021 in finding that the Attorney General has authority to prosecute election laws outside of the Election Code.**

The legislature knew how to grant statewide officials jurisdictional authority over matters outside the Election Code, yet did not do so with respect to the AG's prosecutorial authority. *See* TEX. ELEC. CODE § 31.003 (obligating the Secretary of State to ensure uniform application of "election laws outside this code"); *id.* § 31.004 (obligating the Secretary of State to advise election authorities regarding "election laws outside this code"). Had the legislature intended to grant the AG authority to

prosecute "election laws outside this code," it would have said so. It did not, and the rules of statutory construction require the court to presume that choice was intentional. *See DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quotation marks omitted); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("[E]very word excluded from a statute must [ ] be presumed to have been excluded for a purpose.").

The court below relied upon the Secretary's power to administer election laws "outside this code" to conclude that "if the Legislature wished to limit section 273.021 to only those laws within the Election Code, it could have done so." *See Texas v. Stephens*, No. 01-19-00209-CR, at 9-10. But this turns the rules of construction on their head. The Court of Appeals' reasoning that the default rule in the Election Code is that "election laws" refers to those both inside and outside the Election Code, and any limitation must be expressly stated, not only violates the principle that courts should interpret different statutory text as having intentionally different meanings, *see DeWitt*, 904 S.W.2d at 653; *Cameron*, 618 S.W.2d at 540, but it also unnecessarily adopted a construction that rendered statutory text meaningless, *see Badgett v. State*, 42 S.W.3d 136, 149 (Tex. Crim. App. 2001) ("[S]tatutes are to be construed, if at all

possible, so as to give effect to all of its parts, and so that no part is to be construed as void or redundant.").

**c. Even if the Attorney General has the authority to prosecute election laws outside of the Election Code, the Court misinterpreted both the factual background and legal effect of precedent in determining that Penal Code § 37.10 is an election law.**

Penal Code § 37.10 is not an "election law," and thus the Attorney General could not prosecute violations of that statute even if Election Code § 273.021's grant of authority extended beyond the Election Code's criminal provisions.

In *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997), the Fifth Circuit, in an ADA challenge, held that the phrase "election laws" in the Election Code "only encompasses laws that specifically govern elections, not generally applicable laws that might cover some aspect of elections." *Id.* at 430.

The same logic should apply here. Nothing about Chapter 37 of the Penal Code, entitled "Perjury and Other Falsification," the Chapter's home outside the Election Code, or the specific offense at issue suggests § 37.10 is an "election law." § 37.10(a)(2. The only reference to elections comes in the "Definitions" section. A "governmental record" is defined to include court records of Texas courts, other states' courts, federal courts, and tribal courts; motor vehicle insurance forms; health and safety forms maintained by food trucks; an "official ballot or other election record"; "anything belonging to, received by, or kept by government for information";

or "anything required by law to be kept by others for information of government." TEX. PENAL CODE § 37.01(2)(A)-(F). This single reference to elections—like the ADA's single reference to voting—does not transform § 37.10 into an "election law."[2]

If § 37.10 is an "election law," then it is also an agricultural law, a water law, a business law, and so on. As the Fifth Circuit reasoned in *Lightbourn*, "we do not think that the common, ordinary meaning of 'election laws' includes a law that can be characterized in so many different ways." 118 F.3d at 430. § 37.10 does not "specifically govern elections," but rather is a "generally applicable law[ ] that might cover some aspect of elections," and thus is not an "election law" prosecutable by the AG. *Id.* Just as the Fifth Circuit concluded in *Lightbourn* with respect to the secretary of state's authority, the legislature did not intend for the AG to gain roving prosecutorial authority over any statute pertaining in some way to elections.

**d. The court misapplied principles of statutory interpretation to find that campaign finance reports are election records.**

Even if the AG could prosecute violations of § 37.10 involving "election records," he still lacks prosecutorial authority in this case because a campaign finance report is not an "election record." The court below concluded that campaign finance reports are election records because Stephens was required to submit her campaign

[2] The court below found that "[u]nlike the statute in *Lightbourn*, the Penal Code explicitly refers to election matters." *Stephens*, No. 01-19-00209-CR at 11. But, as described above, the statute in *Lightbourn does* refer to election matters by specifically referencing voting.

finance report to the county, and "documents received by the government are 'government records.'" *Stephens*, No. 01-19-00209-CR at 12. This is in error.

In 2003, the legislature amended the definition of "governmental record" in § 37.01(a) of the Penal Code to include "an official ballot or other election record." Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 21, 2003 Tex. Gen. Laws 1633, 1639–40. If the court below's reasoning were correct, then this was an entirely superfluous addition because campaign finance reports (like official ballots) have always been "received by the government." *Stephens*, 01-19-00209-CR at 12. The Court must avoid an interpretation that renders the specified list of exemplar "governmental records" superfluous. Under the principle of *ejusdem generis*, the general phrase "other election record" is limited to "things of the same kind," *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000), as the specifically enumerated example of an "official ballot."

The legislature's purpose in its 2003 amendment was to reduce voter fraud, and the phrase "election record" must be understood in that light. This would include election records used in the actual voting process, such as ballots, voting machine tabulation records, and vote canvass records. A campaign finance report is quite different in character and purpose than an "official ballot." Where a term or phrase is specifically defined, courts "will not extend a definition beyond the chapter or article to which it is expressly limited." *Ex parte Ruthart*, 980 S.W.2d 469, 472 (Tex. Crim.

App. 1998). When the state seeks to levy criminal penalties, clarity of the rules is even more necessary.

## PRAYER

Appellant respectfully prays that this Court grant her petition for discretionary review, set this case for oral argument, and reverse the decision of the Court of Appeals by (a) affirming the trial court's quashing of count I of the indictment, and (b) reversing the trial court's denial of a writ of habeas corpus and holding that the statute delegating prosecutorial authority of election laws to the Attorney General is unconstitutional.

December 7, 2020

Respectfully submitted,

/s/ Chad W. Dunn
Russell Wilson II
State Bar No. 00794870
Law Office of Russell Wilson II
1910 Pacific Ave. #15100
Dallas, Texas 75201
(469) 573-0211

Chad W. Dunn
State Bar No. 24036507
Brazil & Dunn LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
(512) 717-9822

*Counsel for Defendant Zena Stephens*

## CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 4,367 words, excluding the portions of the brief exempted by Rule T.R.A.P. 9.4(i)(2)(D).

/s/ Chad W. Dunn
Chad W. Dunn

## CERTIFICATE OF SERVICE

On December 7, 2020, this document was served electronically on Beth Klusmann, lead counsel for the State of Texas, via beth.klusmann@oag.texas.gov.

/s/ Chad W. Dunn
Chad W. Dunn

**PD-1032-20 & PD-1033-20**

In the
Court of Criminal Appeals of Texas
At Austin

ZENA COLLINS STEPHENS,

*Appellant,*

v.

THE STATE OF TEXAS,

*Appellee.*

In the Court of Appeals for the First District of Texas in Houston
No. 01-19-00209-CR and No. 01-19-00243-CR

# APPENDIX OF PETITION FOR DISCRETIONARY REVIEW OF APPELLANT ZENA COLLINS STEPHENS


Russell Wilson II
Law Office of Russell Wilson II
1910 Pacific Ave. #15100
Dallas, Texas 75201
(469) 573-0211
russell@russellwilsonlaw.com

Chad W. Dunn
Brazil & Dunn LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
(512) 717-9822
(512) 515-9355 Facsimile
chad@brazilanddunn.com

*Counsel for Appellant*

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**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-19-00209-CR**

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**STATE OF TEXAS, Appellant**

**V.**

**ZENA COLLINS STEPHENS, Appellee**

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**On Appeal from the 344th District Court**
**Chambers County, Texas**
**Trial Court Case No. 18DCR0152**

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**and**

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**NO. 01-19-00243-CR**

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**EX PARTE ZENA COLLINS STEPHENS, Relator**

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**Original Proceeding on Petition for Writ of Habeas Corpus**

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## O P I N I O N

The Attorney General acting for the state of Texas indicted Zena Collins Stephens for tampering with a governmental record in violation of the Texas Penal Code and two counts of accepting a cash contribution over $100 in violation of the Texas Election Code. TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033. Stephens filed a motion to quash the indictment alleging that the Attorney General did not have statutory authority to prosecute her for a violation of the Penal Code. She also filed a pretrial application for a writ of habeas corpus alleging that the statute delegating prosecutorial authority of election laws to the Attorney General was unconstitutional and that venue was improper in Chambers County. After a hearing, the trial court granted the motion to quash the indictment as to count I, which alleged a violation of the Penal Code, and denied the application for a writ of habeas corpus. The State appeals the trial court's pretrial order quashing count I of the indictment, and Stephens appeals the denial of her application for pretrial writ of habeas corpus.

We reverse the trial court's order quashing count I of the indictment and affirm the denial of Stephens's application for pretrial writ of habeas corpus.

## Background

This case arises from an investigation into Stephens's campaign for Jefferson County Sheriff, a position to which she was elected in 2016. The Federal Bureau of Investigation discovered information regarding potential campaign-finance violations concerning Stephens and turned the information over to the Texas Rangers. The Texas Rangers presented the results of their investigation to the District Attorney of Jefferson County. The District Attorney advised the Texas Rangers to contact the Texas Attorney General instead. The Attorney General's Office chose to prosecute the case and presented evidence to a grand jury in Chambers County, which adjoins Jefferson County.

In April 2018, the Chambers County grand jury indicted Stephens on three counts: one count of tampering with a governmental record in violation of the Texas Penal Code, which is a state jail felony; and two counts of accepting a cash contribution exceeding $100 in violation of the Texas Election Code, which are misdemeanors. TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033.

With respect to the first count, the indictment specifically alleged that Stephens

> With Intent to defraud or harm another, namely: the Jefferson County [Cl]erk or Jefferson County or the citizens of Jefferson County. . . did present or use a record or document, namely: a Candidate/Officeholder campaign Finance Report, by reporting a $5,000.00 individual cash contribution in the political contributions of $50 or less

> section of said Report, with knowledge of Its falsity and with Intent that it be taken as a genuine governmental record.

The remaining two counts alleged acceptance of $1,000 in cash and $5,000 in cash, respectively, from a single contributor in violation of Texas Election Code section 253.033(a).

Stephens moved to quash the indictment arguing that the Attorney General did not have authority to prosecute a violation of the Penal Code. In her motion to quash the indictment, Stephens argued that the Attorney General's ability to prosecute a criminal offense "prescribed by the election laws" of Texas did not give the Attorney General power to prosecute offenses outside the Texas Election Code, such as count I of the indictment. *See* TEX. ELEC. CODE § 273.021(c) ("The attorney general may prosecute a criminal offense prescribed by the election laws of this state.").

She filed an application for a pretrial writ of habeas corpus, challenging the constitutionality of the Election Code statute giving the Attorney General prosecutorial authority. In her habeas petition, Stephens alleged that section 273.021(c) was unconstitutional because the Texas Constitution mandates separation of powers, and the statute delegates a duty belonging to the judiciary to the executive branch. She also argued that venue was improper in Chambers County. Specifically, she claimed that the Election Code provides that an offense may be

prosecuted in the county in which the offense occurred or an adjoining county, but venue for the violation of the Penal Code is the county where the offense was committed. *See* TEX. ELEC. CODE § 273.024; TEX. CODE CRIM. PROC. art. 13.18. Since the felony charge of tampering with a governmental record is in the Texas Penal Code rather than the Election Code, she alleged that Chambers County was not the proper venue for prosecution because the indictment alleged that the offense occurred in Jefferson County.

Following a hearing, the trial court granted Stephens's motion to quash as to count I of the indictment but denied it as to counts II and III. The trial court also denied Stephens's petition for a pretrial writ of habeas corpus.

The State appeals the order quashing count I of the indictment, and Stephens appeals the denial of the pretrial habeas petition.

**Validity of the Indictment**

On appeal, the State argues that the trial court erred in quashing count I of the indictment because the Election Code authorizes the Attorney General to prosecute violations of elections laws. The State contends that the trial court erroneously concluded that the Attorney General's prosecutorial authority was limited to election laws found within the Election Code. We agree.

## A. Standard of Review

Both a trial court's decision on a motion to quash an indictment and issues of statutory construction are questions of law that are reviewed de novo. *State v. Rousseau*, 396 S.W.3d 550, 555 n.6. (Tex. Crim. App. 2013) (motion to quash); *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019) (statutory construction).

This appeal presents an issue of statutory construction. When interpreting a statute, we seek to effectuate the "collective" intent or purpose of the legislators who enacted the legislation. *Hughitt v. State*, 583 S.W.3d 623, 626 (Tex. Crim. App. 2019); *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014). We read the statute as a whole and give effect to the plain meaning of the statute's language, unless the statute is ambiguous, or the plain meaning leads to absurd results that the legislature could not possibly have intended. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015); *see also Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning."). To determine plain meaning, we read words and phrases in context and construe them according to the rules of grammar and usage. *Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018); *Yazdchi*, 428 S.W.3d at 837. We presume that every word in a statute has been used for a purpose and that each word, clause, and sentence

should be given effect if reasonably possible. *Wagner*, 539 S.W.3d at 306; *Liverman*, 470 S.W.3d at 836.

If a statute's language is ambiguous, or if application of the statute's plain meaning would lead to an absurd result that the Legislature could not possibly have intended, then a court may consider extratextual factors. *Boykin*, 818 S.W.2d at 785–86. A statute is ambiguous when it "may be understood by reasonably well-informed persons in two or more different senses." *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012); *see also Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013) (stating a statute is ambiguous when the language it employs is "reasonably susceptible to more than one understanding."). On the other hand, a statute is unambiguous when it reasonably permits no more than one understanding. *See State v. Neeley*, 239 S.W.3d 780, 783 (Tex. Crim. App. 2007).

**B. Applicable Law**

Texas election law requires candidates for public office to file a campaign-finance report at least twice a year, and the report must include a variety of information, including "the total amount or a specific listing of the political contributions of $50 or less accepted." TEX. ELEC. CODE § 254.031(a)(5) (requiring a listing of contributions $50 or less); *see id.* §§ 254.063 (requiring January and July reports), 254.064 (stating additional reports may be required), 254.066 (stating reports are filed with the authority with whom the candidate's campaign treasurer

appointment is required to be filed). A candidate "may not knowingly accept from a contributor in a reporting period political contributions in cash that in the aggregate exceed $100." *Id.* § 253.033(a).

Section 37.10(a)(2) of the Texas Penal Code makes it an offense to make, present, or use any "record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record." TEX. PENAL CODE § 37.10(a)(2). "Governmental record" is defined in the Penal Code to include "anything belonging to, received by, or kept by government for information, including a court record" and "an official ballot or other election record". *Id.* § 37.01(2)(A), (E).

Section 273.021 of the Election Code gives the Attorney General some prosecutorial authority, stating:

> (a) The attorney general may prosecute a criminal offense prescribed by the election laws of this state.
>
> (b) The attorney general may appear before a grand jury in connection with an offense the attorney general is authorized to prosecuted under Subsection (a).

TEX. ELEC. CODE § 273.021(a–b). Venue for prosecutions brought by the Attorney General under this provision of the Election Code is "the county in which the offense was committed or an adjoining county." *Id.* § 273.024.

## C. Authority of the Attorney General

The parties dispute the Attorney General's authority to prosecute election laws, as stated in section 273.021 of the Election Code. The trial court held that the Attorney General did not have jurisdiction to prosecute count I of the indictment against Stephens, which alleged tampering with a government record under the Penal Code. On appeal, the State argues that section 273.021 unambiguously gives the Attorney General jurisdiction to prosecute violations of election laws, whether the law is inside or outside of the Election Code. We agree.

Section 273.021(a) of the Election Code clearly and unambiguously gives the Attorney General power to prosecute criminal laws prescribed by election laws generally, whether those laws are inside or outside of the Code. When a statute is unambiguous, the court should not add to or subtract from it. *Ex parte Vela*, 460 S.W.3d 610, 612 (Tex. Crim. App. 2015). The phrase "election laws" is not synonymous with "Election Code," and if the Legislature intended to limit the Attorney General's prosecutorial authority to laws found only in the Election Code, it could have done so.

This interpretation is confirmed by other provisions of the Election Code. When interpreting a statute, courts look "not only at the single, discrete provision at issue but at other provisions within the whole statutory scheme." *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016). Other sections of the Election Code

acknowledge the existence of election laws both outside and inside the Code. For example, section 31.003 directs the Secretary of State to maintain uniformity "of this code and of the election laws outside this code." TEX. ELEC. CODE § 31.003. Similarly, section 31.004 directs the Secretary of State to assist election authorities "with regard to the application, operation, and interpretation of this code and of the election laws outside this code." *Id.* § 31.004. The Legislature specifically referenced election laws outside of the Code, supporting that if the Legislature wished to limit section 273.021 to only those laws within the Election Code, it could have done so. We hold that section 273.021 authorizes the Attorney General to prosecute election laws found outside of the Election Code.

**D. Campaign Finance Reports are Election Records**

We next determine whether the Penal Code provision under which Stephens was indicted qualifies as an "election law" under section 273.021(a). *See* TEX. ELEC. CODE § 273.021(a) (giving the Attorney General power to prosecute a criminal offense prescribed by "the election laws of this state"). The State argues that because the Legislature explicitly included "election record" within the definition of "governmental record" in the Penal Code, section 37.10 of the Penal Code is an election law when used with respect to election records, such as a campaign-finance report. *See* TEX. CODE CRIM. PROC. art. § 37.01(2)(E) (defining "governmental record"); *id.* § 37.10(a)(2) (stating it is a crime to present a document with intent that

it be taken as a genuine governmental record). Stephens relies on *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997), and argues that election laws only encompass laws that specifically govern elections.

In *Lightbourn*, the Fifth Circuit concluded that the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134, was not an election law. *Lightbourn*, 118 F.3d at 430. The court reasoned that the ADA is a generally applicable law with no specific provisions related to elections or voting. *Id.* Therefore, the Secretary of State had no duty to take steps to ensure local election officials complied with the ADA. *Id.*

Unlike the statute in *Lightbourn*, the Penal Code explicitly refers to election matters. In 2003, the Legislature specifically amended the definition of "governmental record" in section 37.01(a) of the Penal Code to include "an official ballot or other election record." Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 21, 2003 Tex. Gen. Laws 1633, 1639–40.

"Government record" is defined in the Penal Code to include "anything belonging to, received by, or kept by government for information, including a court record" and "an official ballot or other election record." TEX. PENAL CODE § 37.01(2)(A), (C). The indictment alleges that Stephens presented a false campaign finance report to Jefferson County. Stephens was required to submit the report pursuant to section 254.063 of the Election Code. TEX. ELEC. CODE § 254.063.

"Government," as defined in the Penal Code, includes Jefferson County. TEX. PENAL CODE § 1.07(24) ("Government" means the state, a county, municipality, or political subdivision of the state, or any branch or agency of the same). Section 37.10 does not define when a document becomes a governmental record, but courts have held that documents received by the government are "government records." *See State v. Vasilas*, 187 S.W.3d 486, 491 (Tex. Crim. App. 2006) (finding that a petition for expunction was not a governmental record when the defendant prepared it, but that for purposes of section 37.10 it became one once the court received it and the defendant used it in seeking to obtain the expunction); *Pokladnik v. State*, 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.) (holding false statement on affidavit for foreclosure submitted on State Department of Highways and Public Transportation form was not a governmental record until filed with the Department of Public Safety); *Constructors Unlimited, Inc., v. State*, 717 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1986, no pet.) (holding forms submitted to a governmental entity were not governmental records at the time false entries were made because the forms did not belong to the government, had not been received by the government, and were not kept by the government for information). A campaign-finance report that has been presented to the county, as mandated by election law, is a "governmental record" for purposes of prosecution under section 37.10 of the

Penal Code, and we hold that the Attorney General has authority to indict and prosecute an allegation of presentment of a false report.

We sustain the State's issue on appeal. Accordingly, we reverse the trial court's order quashing count I of the indictment.

**Stephens's Application for Pretrial Writ of Habeas Corpus**

Stephens appeals the denial of her application for a pretrial writ of habeas corpus. On appeal, she argues that her petition should have been granted because section 273.021 of the Election Code's delegation of authority to prosecute election laws to the Attorney General violates the Texas Constitution. Specifically, she argues that the section violates the separation of powers doctrine in the Texas Constitution. *See* TEX. CONST. art. II, § 1. She also argues that venue was improper in Jefferson County. Having decided that section 273.021 of the Election Code gives the Attorney General power to prosecute election law violations both inside and outside the Election Code, we now review whether the statute is an unconstitutional delegation of power.

## A. Standard of Review

Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). It is reserved "for situations in which the protection of the applicant's substantive rights or the

conservation of judicial resources would be better served by interlocutory review." *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

The Court of Criminal Appeals has limited the use of pretrial habeas applications to issues that would result in the applicant's immediate release and has "held that an applicant may use pretrial writs to assert his or her constitutional protections with respect to double jeopardy and bail," to challenge the facial constitutionality of the statute under which she is prosecuted, or to allege that the offense charged is barred by the statute of limitations. *Ex parte Estrada*, 573 S.W.3d 884, 891–92 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (quoting *Ex parte Weise*, 55 S.W.3d at 619–20). Additionally, pretrial habeas is generally unavailable when the resolution of the claim may be aided by the development of a record at trial. *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017)

A trial court's ruling on a habeas petition is reviewed for an abuse of discretion. *Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). We view the evidence in the light most favorable to the trial court's ruling. *Sandifer v. State*, 233 S.W.3d 1, 2, (Tex. App.—Houston [1st Dist.] 2007, no pet.). We review legal questions raised by the petition de novo. *Id.*

**B. Separation of Powers**

On appeal, Stephens contends that the district court abused its discretion in denying her application for a writ of habeas corpus because the statute giving

authority to the Attorney General to prosecute violations of election laws violates the separation of powers doctrine of the Texas Constitution. *See* TEX. CONST. art. II, § 1. Stephens argues that the authority to prosecute crime belongs exclusively to district and county attorneys, who are members of the judicial branch. *See* TEX. CONST. art. V, § 21. She contends that the Legislature cannot grant the authority to prosecute to the Attorney General, who is part of the executive branch. *See id.* art. IV, § 22.

As an initial matter, Stephens cannot raise this argument regarding the Attorney General's constitutional authority to prosecute crime with respect to counts II and III because she did not raise that argument in the trial court. *See* TEX. R. APP. P. 33.1(a). In her pretrial habeas petition, she challenged only the authority of the Attorney General to "bring the criminal allegations set forth in . . . Count I." With respect to counts II and III, Stephens did not make a timely objection or motion to the trial court stating her grounds for relief. *See id.*

Facial constitutional challenges "are cognizable on pretrial habeas regardless of whether the particular constitutional right at issue would be effectively undermined if not vindicated prior to trial." *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016). The Texas Constitution expressly guarantees the separation of powers between the branches of government. TEX. CONST. art. II, § 1. To demonstrate a separation of powers violation, Stephens must show that either (1) one

branch of government has assumed or been delegated a power more properly attached to another branch, or (2) one branch of government is unduly interfering with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991).

Stephens argues that giving authority to the Attorney General to prosecute election laws unduly interferes with the functioning of the judicial branch. The offices of county and district attorneys are in the judicial branch of government. *See* TEX. CONST. art. V, § 21. While their powers are not enumerated, courts have recognized that, along with various civil duties, their primary function is "to prosecute the pleas of the state in criminal cases." *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (internal quotation and citation removed); *see also Saldano v. State*, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002). The Attorney General's duties are prescribed by article IV, section 22 of the Texas Constitution which states:

> The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice

> in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

TEX. CONST. art. IV, § 22. The "other duties" clause of this section provides legislative authority to empower the Attorney General with other duties. *See Medrano v. State*, 421 S.W.3d 869, 878–79 (Tex. App.—Dallas 2014, pet. ref'd). Stephens argues that these provisions mean that the authority to represent the State in trial courts belongs exclusively in the judicial branch and allowing the Attorney General to prosecute election law violations unduly interferes with the functioning of that branch. We disagree.

Under the doctrine of *ejusdem generis*, "'when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.'" *State v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309, 312 (Tex. 2007) (quoting *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). The Texas Constitution gives the Attorney General the power to represent the State, to provide legal advice when asked by the Governor or other executive officers, and to take action against corporations and their charters. In general, these duties relate to State created entities. The last clause of the Constitution describing the authority of the Attorney General, gives him power "to perform other duties as may be required by law." TEX. CONST. art. IV, § 22. Using

the doctrine of *ejusdem generis*, this clause provides the exception required to allow the Attorney General to represent the State in criminal prosecutions of election laws, as proscribed by the Legislature. *See Saldano*, 70 S.W.3d at 880 ("[The Texas Constitution] authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution."); *Medrano*, 421 S.W.3d at 879. This is in keeping with the constitutional delegation of power, which allows the Attorney General to represent the State, to advise the State, and to act on behalf of the State against corporations. Corporations, like elections and elected offices, are wholly creatures of state action. It follows that the Attorney General has authority to prosecute election law violations.

Stephens has not demonstrated that section 273 of the Election Code delegates to the executive branch a power more properly given to the judicial branch nor has she demonstrated that doing so unduly interferes with the functioning of county and district attorneys. Courts have recognized that some duties of county and district attorneys are more accurately characterized as executive and some duties imposed upon the Attorney General are both executive and judicial. *See id.* at 879 (citing *Meshell*, 739 S.W.2d at 253 n.9 and *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1905)). Section 273 gives the Attorney General concurrent jurisdiction with county and district attorneys. It does not take away their ability to prosecute election law violations. It is not the case that the Legislature has delegated away the county and

district attorneys' responsibilities. "Absent the consent of a local prosecutor or the request of a district or county attorney for assistance, the attorney general has very limited authority to represent the state in criminal cases in trial courts." *Ex parte Lo*, 424 S.W.3d 10, 30 n.2 (Tex. Crim. App. 2013) (op. on reh'g). Giving the Attorney General concurrent authority to prosecute a limited class of criminal cases does not delegate a power to the Attorney General more properly attached to another branch nor does it unduly interfere with the duties of the district and county attorneys such that they "cannot *effectively* exercise [their] constitutionally assigned powers." *Jones*, 803 S.W.2d at 715 (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990) (emphasis in original).

The trial court did not abuse its discretion in denying Stephens's pretrial habeas because the statutory delegation to the Attorney General does not violate the Texas Constitution.

**C. Venue**

On appeal, Stephens also argues that the district court abused its discretion in denying her pretrial application for writ of habeas corpus because venue is improper in Chambers County.

Venue is distinct from jurisdiction. *Ex parte Watson*, 601 S.W.2d 350, 351 (Tex. Crim. App. 1980). Jurisdiction concerns the power of the court to hear and determine the case. *Id.* Venue concerns the geographic location where a case may be

tried. *See Soliz v. State*, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003). Regarding the criminal jurisdiction of district courts, article V, section 8 of the Texas Constitution provides only that "those courts shall have original jurisdiction in criminal cases of the grade of felony," and of all misdemeanors involving official misconduct." TEX. CONST. art. V, § 8. Improper venue, therefore, does not deprive the court of jurisdiction and may not be raised in habeas proceedings. *Ex parte Watson*, 601 S.W.2d at 352. Likewise, venue is the sort of claim that may be aided by the development of a record at trial. *Ex parte Ingram*, 533 S.W.3d at 892.

On this record, we cannot conclude that the district court abused its discretion in denying Stephens's pretrial application for writ of habeas corpus.

## Conclusion

We reverse the trial court's order quashing count I of the indictment. We affirm the trial court's order denying Stephens's pretrial application for writ of habeas corpus. We remand this case to the trial court.

Peter Kelly
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

Justice Goodman, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

**Opinion issued July 9, 2020**


**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-19-00209-CR**

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**THE STATE OF TEXAS, Appellant**

**V.**

**ZENA COLLINS STEPHENS, Appellee**

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**On Appeal from the 344th District Court**
**Chambers County, Texas**
**Trial Court Case No. 18DCR0152**

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**and**

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**NO. 01-19-00243-CR**

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**EX PARTE ZENA COLLINS STEPHENS**

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**Original Proceeding on Petition for Writ of Habeas Corpus**

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## DISSENTING OPINION

Zena Collins Stephens, Sheriff of Jefferson County, argues that section 273.021 of the Election Code, which authorizes the Attorney General to prosecute criminal violations of Texas election law, facially violates the Texas Constitution's separation-of-powers mandate. The majority rejects her argument and affirms the trial court's denial of her pretrial petition for a writ of habeas corpus. Because section 273.021 violates the separation-of-powers mandate, I respectfully dissent.

## BACKGROUND

Stephens was elected in 2016. Afterward, the Texas Rangers investigated alleged campaign-finance violations. The Rangers presented the results of their investigation to the District Attorney of Jefferson County, who advised the Rangers to contact the Attorney General instead. The Attorney General chose to prosecute the case and moved it from Jefferson County to adjoining Chambers County, where a grand jury later indicted Stephens on three counts, one for the felony of tampering with a government record and two for the misdemeanor of accepting a cash donation exceeding $100. *See* TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033.

## DISCUSSION

### Question Presented and the Majority's Answer

Our Constitution creates three distinct departments of government—legislative, executive, and judicial—and mandates that members of one shall not

exercise any power properly attached to the others, unless the Constitution expressly provides for its exercise. TEX. CONST. art. II, § 1. The Constitution grants the authority to represent the State in district and inferior courts to District Attorneys and County Attorneys, who are members of the judicial department. *Id.* art. V, § 21. It is well-settled that this constitutional grant of authority includes the exclusive responsibility and control of criminal prosecutions. *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987). The Legislature nonetheless has authorized the Attorney General, a member of the executive department, to represent the State in district and inferior courts to prosecute election-law violations. TEX. ELEC. CODE § 273.021. Can the Legislature delegate this authority to the Attorney General?

The majority says yes. The majority relies on the Constitution's grant of authority to the Attorney General, which states that he:

> shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

TEX. CONST. art. IV, § 22. According to the majority, the final clause directing the Attorney General to "perform such other duties as may be required by law" allows

the Legislature to authorize him to prosecute election-law violations consistent with the constitutionally mandated separation of powers. I disagree.

**Separation of Powers**

The Texas Constitution, unlike the United States Constitution, expressly mandates the separation of powers. It provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. This express mandate "suggests that Texas would more aggressively enforce separation of powers between its governmental branches than would the federal government." *Ex parte Perry*, 483 S.W.3d 884, 894 (Tex. Crim. App. 2016) (plurality op.); *see also* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990) (separation-of-powers mandate "is phrased strongly").

Our Constitution's separation-of-powers mandate is violated in one of two ways. First, it is violated when one department of government assumes or is delegated a power more properly attached to another department. *Ex parte White*, 506 S.W.3d 39, 50 (Tex. Crim. App. 2016); *see also Rushing v. State*, 85 S.W.3d 283, 285 (Tex. Crim. App. 2002) (assumption or delegation "to whatever degree" of

power more appropriately attached to other department violates mandate). Second, the mandate is violated when one department unduly interferes with another department so that the latter cannot effectively exercise its constitutionally assigned powers. *Ex parte White*, 506 S.W.3d at 50.

**Constitutional Interpretation**

Like statutes, when we interpret constitutional provisions, our primary guide is their language because this is the best indicator of the intent of the framers who drafted them and the citizenry who adopted them. *Johnson v. Tenth Jud. Dist. Ct. of App. at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008). If, however, the language is less than plain and admits of ambiguity, we may consider extratextual factors. *Id.* One extratextual factor we may consider is the canon of construction known as ejusdem generis. *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000). This Latin phrase means of the same kind, class, or nature. *Thomas v. State*, 65 S.W.3d 38, 41 (Tex. Crim. App. 2001). Thus, when interpreting general words that follow a list of particular or specific things, the meaning of the general words should be limited to things of the same kind. *Id.* For example, our Constitution provides that the Legislature shall bar from public office persons "who have been convicted of bribery, perjury, forgery, or other high crimes." TEX. CONST. art. XVI, § 2. In interpreting the general words "other high crimes," the Court of Criminal Appeals applied the canon of ejusdem generis to limit them to crimes like the

specific ones enumerated in the provision—crimes involving "moral corruption and dishonesty inherent in the specified offenses." *Perez*, 11 S.W.3d at 221.

## Analysis

*Scope of Article IV, Section 22*

The Constitutional provision setting forth the authority of the Attorney General is less than plain and reasonably could be assigned more than one meaning with respect to its reference to "such other duties as may be required by law." Because these words are general in nature and preceded by a number of particular grants of authority, resort to ejusdem generis to interpret them is proper. *See id.*

The Constitution specifically grants the Attorney General authority to:

- represent the State in the Supreme Court of Texas;
- inquire into charters of private corporations and seek judicial forfeiture of these charters when warranted unless otherwise expressly directed by law;
- represent the State in court to keep corporations from exercising any unlawful power or seeking unlawful taxes, tolls, freight, or wharfage; and
- give written legal advice to the Governor and other executive officers when it is requested by them.

TEX. CONST. art. IV, § 22.

None of these specific constitutional grants of authority to the Attorney General concern criminal proceedings or elections. The Legislature's delegation of authority to the Attorney General to prosecute violations of Texas election law therefore is not grounded in any of the specific powers given to the Attorney General

by the Constitution. To interpret "such other duties as may be required by law" as authorizing such a legislative delegation, one must interpret this general phrase without reference to and in isolation from the specific grants that precede it. This mode of interpretation disregards both the canon of ejusdem generis and the well-established rule that constitutional provisions should not be interpreted in isolation from their surroundings. *See Johnson*, 280 S.W.3d at 872 n.36.

The history of the office of the Texas Attorney General underscores his lack of authority to prosecute election-law violations. The absence of criminal prosecutorial authority in particular from the Attorney General's constitutional portfolio was the result of a conscious choice, not an oversight. Since Reconstruction, the Attorney General has been a member of the executive department. *Saldano v. State*, 70 S.W.3d 873, 879 (Tex. Crim. App. 2002). The Constitution of 1876, which establishes the structure of our government and the powers of its constitutive parts, stripped the Supreme Court of Texas of its criminal jurisdiction and thereby eliminated the sole specific constitutional authority the Attorney General had once possessed to appear in criminal cases. *See id.* at 879–81. The diffusion of criminal prosecutorial authority among a multitude of District Attorneys and County Attorneys who are outside of the executive department is in keeping with the unique structure of Texas government, which was deliberately

fractured in response to the despotic control wielded by the Reconstruction governor. *See id.* at 877–78.

In sum, neither the language nor the history of article IV, section 22 of the Texas Constitution supports the majority's holding that the Legislature may authorize the Attorney General to prosecute election-law violations. The lone interpretation of "such other duties as may be required by law" that confines the Attorney General to his constitutionally prescribed role as a member of the executive department places such authority outside his office. Interpreting this phrase to allow the Legislature to assign the Attorney General the authority to prosecute criminal violations of the election laws violates the constitutionally mandated separation of powers because it delegates to him a power more properly assigned to the judicial department. *See* TEX. CONST. art. V, § 21; *Meshell*, 739 S.W.2d at 254.

*The Majority's Flawed Reasoning*

The majority makes two perfunctory arguments in support of its holding. First, it cites *Saldano* for the proposition that the Legislature may delegate prosecutorial authority to the Attorney General. *See Saldano*, 70 S.W.3d at 880. Second, leaning on *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd), the majority suggests that because the Constitution already assigns both executive and judicial duties to the Attorney General, the legislative assignment of additional

judicial duties to him does not amount to the delegation of a power more properly attached to another department. *See id.* at 879–80. Neither argument is persuasive.

In *Saldano*, the Court of Criminal Appeals remarked in passing that the Legislature's ability to assign other duties to the Attorney General, "presumably, could include criminal prosecution." 70 S.W.3d at 880. But this remark was unnecessary to the Court's decision and unaccompanied by any analysis. The remark therefore is obiter dictum, which is not binding. *See Garrett v. State*, 377 S.W.3d 697, 704 n.27 (Tex. Crim. App. 2012). Dictum is instructive solely to the extent that its analysis is persuasive. *See id.* Dictum bereft of analysis is not persuasive.

The majority's second point is less an argument than a non-sequitur. Though the Constitution expressly gives the Attorney General duties that are both executive and judicial in function despite his status as an officer of the executive department, it does not follow that the Legislature may give him any additional judicial duty it desires. Our Constitution forbids doing so by specifying that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." TEX. CONST. art. II, § 1. Consequently, any judicial duty the Attorney General wields must stem from an express grant of authority in the Constitution. *See Meshell*, 739 S.W.2d at 252 ("Although one department has occasionally exercised a power that would otherwise seem to fit within the power of another department,

our courts have only approved those actions when authorized by an express provision of the Constitution."). None of the Attorney General's duties set forth in article IV, section 22 of the Constitution concern criminal or electoral matters.

*The Attorney General's Additional Arguments*

In the State's briefing, the Attorney General suggests several additional bases for his authority to prosecute election-law violations. He first relies on longstanding practice. The Attorney General advises that the Legislature has authorized his office to prosecute violations of Texas election law since 1951. An uninterrupted tradition or longstanding practice, however, "cannot provide authority that the law does not." *Saldano,* 70 S.W.3d at 883. Our Constitution is the fundamental law of Texas. *Oakley v. State*, 830 S.W.2d 107, 109 (Tex. Crim. App. 1992). An unconstitutional statute or practice does not become a constitutional one by age or persistence.

The Attorney General further argues that the Legislature gave his office the authority to prosecute election-law violations because local officials had proved unable to address problems arising out of elections. The Attorney General observes that some cases are too politically sensitive for local prosecutors to handle. *See Medrano,* 421 S.W.3d at 880 (endorsing this rationale). But the question before us is whether the Legislature's grant of prosecutorial authority to the Attorney General in section 273.021 of the Election Code is constitutional, not whether it is wise. *See Montgomery v. State,* 170 S.W.2d 750, 753 (Tex. Crim. App. 1943) (wisdom of

legislation rests exclusively with Legislature, which may pass any law it deems proper so long as law doesn't violate Texas or United States Constitutions).

Finally, the Attorney General makes two consequentialist objections. He first contends that acceptance of Stephens's position as to the separation of powers would effectively invalidate all other statutes authorizing him to bring criminal prosecutions. He then contends that acceptance of Stephens's position likewise would invalidate statutes authorizing him to represent the State in civil suits.

As to other statutes authorizing the Attorney General to prosecute criminal offenses, it is not a foregone conclusion that their constitutional validity turns on section 273.021's. Section 273.021 differs from some of these other statutes. It authorizes the Attorney General to unilaterally initiate a prosecution for a violation of Texas election law. TEX. ELEC. CODE § 273.021(a). The same legislation also grants the Attorney General the authority to direct District Attorneys and County Attorneys to prosecute election-law violations or press these local prosecutors into service to assist in the prosecution of election-law violations. *Id.* § 273.022. In contrast, some other legislative delegations of prosecutorial authority merely allow the Attorney General to prosecute an offense if the District Attorney or County Attorney consents. *See, e.g.*, TEX. PENAL CODE § 1.09 (granting Attorney General authority to prosecute offenses occurring on or involving State property if he has consent of local District or County Attorney). Whether such conditional grants of

authority also run afoul of the separation-of-powers mandate is debatable. That's a question for another day. Section 273.021 is the only statute before us.

At any rate, statutes granting the Attorney General a prosecutorial role are relatively few in number. *See Ex parte Lo*, 424 S.W.3d 10, 30 n.2 (Tex. Crim. App. 2013) (per curiam) (op. on reh'g) (with few exceptions, Attorney General not authorized to represent State in Texas trial courts). Thus, the stakes are less than the Attorney General suggests, even if he is correct that a ruling in Stephens's favor would jeopardize other grants of prosecutorial authority. But to the extent that such a ruling could jeopardize other statutes, this is a function of the Texas Constitution's text and underlying history. The Attorney General's general lack of prosecutorial authority, while unusual in comparison to other attorneys general, reflects Texas's constitutional arrangement. *See Saldano*, 70 S.W.3d at 880–81. Alteration of this arrangement is the sole prerogative of the people. *See Oakley*, 830 S.W.2d at 109. This court is constrained to enforce the Constitution as it is written. *Id.*

As to other statutes authorizing the Attorney General to represent the State in civil suits, it is doubtful that a ruling in Stephens's favor would jeopardize them. The merit of Stephens's position turns in significant part on the Constitution's commitment of criminal matters to the judicial department. *See Meshell*, 739 S.W.2d at 254. Moreover, article VI, section 22 repeatedly authorizes the Attorney General to appear in court in civil matters on behalf of the State in certain contexts. The

Attorney General's authority to represent the State in civil matters therefore is not nearly as susceptible to attack on the basis of the separation-of-powers mandate.

## CONCLUSION

Stephens is entitled to a writ of habeas corpus because the Attorney General's prosecution of her violates the Constitution's separation-of-powers mandate. I respectfully dissent from the majority's refusal to grant her petition for the writ.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

Justice Goodman, dissenting.

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